



upon request, to inspect and to copy” documents within Defendants’ “possession, custody, or control” that they “intend[ ] to use . . . in [their] case-in-chief at trial.”<sup>2</sup> We are still more than 100 days out from trial. Defendants advised the Government during the parties’ Rule 7.1 conference that they have not yet formed an intention to use any particular documents in their case-in-chief and thus do not yet have any Rule 16(b)(1)(A) material to disclose. Furthermore, the Government has offered no legal authority for its argument that Defendants should be forced to choose by the completely arbitrary deadline of September 30, 2011 what materials they will use in their case-in-chief. Defendants are likewise unaware of any legal basis for either the deadline or the relief that the Government’s motion seeks. The Court should thus summarily reject the Government’s motion.

The Government’s motion is ill-founded for an additional reason: because the Government has not yet fulfilled its discovery obligations under Rule 16(a)(1)(E)(ii), Defendants’ obligations under Rule 16(b)(1)(A) have not even been triggered. Under Rule 16(a)(1)(E)(ii), “the government must identify specifically which items it intends to use in its case-in-chief at trial. It may not [simply] identify a large number of documents that it may or may not seek to introduce at trial.” *United States v. O’Keefe*, No. 06-0249, 2007 U.S. Dist. LEXIS 31054, at \*6 (D.D.C. Apr. 27, 2007). Similar to *O’Keefe*, the Government in this case has produced to Defendants the millions of pages of documents it obtained from Stryker Biotech and various third parties during the grand jury process, but it has not yet identified the particular

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<sup>2</sup> Defendants already have advised the Government that they have not performed any examinations or tests the results of which would be discoverable under Rule 16(b)(1)(B). Defendants currently do not expect that any such examinations or tests will be performed between now and trial, though Defendants do not waive their right to conduct such examinations or tests.

documents on which it intends to rely in its case-in-chief.<sup>3</sup> *Cf., e.g., United States v. De La Cruz Paulino*, 61 F.3d 986, 993 (1st Cir. 1995) (holding that “open file” discovery does not provide a defendant with notice of “which evidence the government intends to use at trial”). Accordingly, the Government’s demand for Defendants’ Rule 16(b)(1)(A) disclosures is premature as a matter of law. *See United States v. Anderson*, 416 F. Supp. 2d 110, 115 (D.D.C. 2006) (“[Rule 16 contemplates a] reciprocity of obligations between the defendant and the government . . . [F]or the intended reciprocity to be effectuated, the government must identify what it intends to rely on in its case-in-chief at trial before the defendant must identify what he intends to rely on in his.”).

Defendants and the Government already have agreed upon a schedule for pre-trial exchange of their respective exhibit lists. Defendants believe that those agreed-upon deadlines provide the parties with adequate notice of (and, if necessary, access to) the specific documents that the opposing party intends to use during its respective case-in-chief. There is thus no need for the Court to impose any additional, earlier deadlines on either Defendants or the Government.

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<sup>3</sup> To be sure, the Government did provide Defendants with a separate file of the exhibits it used in the grand jury. But the Government has not indicated which, if any, of those grand jury exhibits it plans to use during its case-in-chief, nor has it indicated which, if any, additional documents it will use during its case-in-chief.

**CONCLUSION**

For the foregoing reasons, the Government's motion to exclude should be denied.

Respectfully submitted,

STRYKER BIOTECH, LLC

MARK PHILIP,

/s/ Joshua S. Levy

By: Brien T. O'Connor (BBO #546767)  
Joshua S. Levy (BBO #563017)  
Ropes & Gray LLP  
Prudential Tower  
800 Boylston Street  
Boston, MA 02199  
617-951-7000  
[Brien.O'Connor@ropesgray.com](mailto:Brien.O'Connor@ropesgray.com)  
[Joshua.Levy@ropesgray.com](mailto:Joshua.Levy@ropesgray.com)

/s/ Stephen G. Huggard

By: Stephen G. Huggard (BBO #622699)  
Edwards Angell Palmer & Dodge  
111 Huntington Avenue  
Boston, MA 02199  
617-239-0769  
[shuggard@eapdlaw.com](mailto:shuggard@eapdlaw.com)

WILLIAM HEPPNER,

DAVID ARD,

/s/ Robert L. Ullmann

By: Robert L. Ullmann (BBO #551044)  
Nutter McClennen & Fish, LLP  
155 Seaport Blvd.  
Boston, MA 02210  
617-439-2262  
[rullmann@nutter.com](mailto:rullmann@nutter.com)  
[msethi@nutter.com](mailto:msethi@nutter.com)

/s/ Brent Gurney

By: Brent Gurney (*pro hac vice* admission)  
Wilmer Cutler Pickering Hale &  
Dorr, LLP  
1875 Pennsylvania Ave.  
Washington, D.C. 20006  
202-663-6000  
[Brent.Gurney@wilmerhale.com](mailto:Brent.Gurney@wilmerhale.com)

JEFFREY WHITAKER,

/s/ Frank A. Libby, Jr.

By: Frank A. Libby, Jr. (BBO #299100)  
LibbyHoopes  
175 Federal Street  
Boston, MA 02110  
617-338-9300  
[fallibby@libbyhoopes.com](mailto:fallibby@libbyhoopes.com)

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**CERTIFICATE OF SERVICE**

I, Joshua Levy, certify that the foregoing brief in opposition was electronically filed on the 30<sup>th</sup> day of September, 2011 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing (“NEF”) and that paper copies will be sent to those indicated as non-registered participants on September 30, 2011.

/s/ Joshua Levy

Joshua Levy